In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 845

CONTINENTAL BAKING COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION

No. 849

LANGENDORF-UNITED BAKERIES, INC., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

No. 852

SAFEWAY STORES, INCORPORATED, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Con. Pet. App. 1a) [1] is reported at 366 F. 2d 795. The hearing

[1] "Con. Pet." refers to the petition for certiorari filed by Continental Baking Company in No. 845. Langendorf-United Bakeries, Inc. and the other petitioners in No. 849 have adopted the Continental and Safeway petitions.

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examiner's initial decision (Con. Pet. App. 100a), the final order and opinion of the Federal Trade Commission (Con. Pet. App. 22a, 27a) and the Commission's opinion after reopening the record (Con. Pet. App. 85a) are unreported.

JURISDICTION

The judgment of the court of appeals (Con. Pet. App. 21a) was entered on September 14, 1966. The petitions in Nos. 845 and 849 were filed on December 9, 1966; the petition in No. 852 was filed on December 12, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Trade Commission has jurisdiction under Section 5 of the Federal Trade Commission Act over a conspiracy to fix the price of bread, where a significant volume (albeit a small percentage) of the sales made pursuant to the conspiracy were in interstate commerce.

STATUTE INVOLVED

Sections 4 and 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 44, 45, provide in pertinent part:

> Sec. 4. The words defined in this section shall have the following meaning when found in this Act, to wit:
>
> "Commerce" means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and

any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

Sec. 5(a)(1). Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

STATEMENT

In 1961 the Federal Trade Commission issued a complaint against the Bakers of Washington, Inc. (the "association"), an association of wholesale and retail bakers, its officers, and its more than fifty members, charging them with conspiring to suppress competition in the sale of bread in violation of Section 5 of the Federal Trade Commission Act (R. I, 1–9).[2] Petitioners are bakery firms who bake and sell bread in many states, and an officer of one of such firms (R. I, 298–305; R. III–A, 312; R. III–B, 397, 398, 401; R. IV, 1076–1121).

After extensive hearings, the examiner found that all of the respondents had engaged in a conspiracy to eliminate or lessen price competition in the sale of bread at both the wholesale and retail level. Much of this activity was accomplished through agreements or understandings which the respondents adopted at association meetings frequently held in Seattle, Washington (R. III, 41–46; 50–57; R. III–A, 251–270; 282; R. III–B, 356–366; 374–388; 464–469; 475–483; 488–495; 513–519). At the hearings petitioners Continental Baking Company ("Continental") and Lang-

[2] "R" refers to the ten volume transcript of record in the court of appeals, on file with the Clerk of this Court.

endorf-United Bakeries, Inc., admitted that they sell bread to customers in Alaska, f.o.b. Seattle, and other respondents admitted interstate sales (R. I, 250). But they contended that 99 percent of their sales involved products produced and sold within the State of Washington, and thus were not in interstate commerce within the meaning of Sections 4 and 5(a)(1) of the Act.

The examiner held that the interstate sales gave the Commission jurisdiction. He further found that certain of the petitioners were "in" interstate commerce due to the multi-state integrated nature of their operations. The examiner proposed a cease-and-desist order which would cover all of petitioners' operations (R. I–A, 545–550).

On appeal the Commission upheld the examiner's findings and adopted the order. The Commission sustained both of the jurisdictional bases upon which the examiner had relied. It ruled that the interstate sales—amounting to approximately 1 percent of the bakeries' total sales—were not *de minimus,* and therefore were sufficient to show that the bakeries were engaged "in commerce" within the meaning of Section 5 of the Federal Trade Commission Act (R. II, 821). The Commission remanded the case to the examiner, however, to give the companies the opportunity to refute certain evidence that had been introduced in another Commission proceeding against Continental, upon which the Commission had relied in concluding that it had jurisdiction because of the integrated interstate operations conducted by the bak-

eries (R. II, 813–866); and, after Continental (but none of the other bakeries) had introduced such additional evidence, the Commission reaffirmed its decision (Con. Pet. App. 85a–99a).

The court of appeals unanimously affirmed the Commission's order. It held that the interstate sales from Washington to Alaska and with other States gave the Commission jurisdiction (Con. Pet. App. 3a, n. 2); and therefore found it unnecessary to consider either the Commission's ruling that it also had jurisdiction because of the integrated interstate character of the bakeries' operations, or the Commission's reliance upon evidence in another proceeding as a basis for asserting the latter jurisdiction (Con. Pet. App. 3a, 15a).

ARGUMENT

The Commission's jurisdiction is, as the court of appeals correctly held, amply supported by its finding that significant sales in interstate commerce were made pursuant to the price-fixing conspiracy, and there is no need to consider the alternative basis upon which the Commission rested its jurisdiction.

Under Section 5 of the Federal Trade Commission Act, the Commission has jurisdiction over "unfair methods of competition in commerce." Commerce is broadly defined as "commerce among the several States * * *" 15 U.S.C. 44. Section 5 has been held not to cover particular sales practices in local markets by local sellers which may adversely affect interstate commerce. *Federal Trade Commission* v. *Bunte*

Bros., 312 U.S. 349, 351.[3] However, Section 5 must also be read in the light of its purpose to supplement and bolster the Sherman and Clayton Acts when conduct such as price fixing is involved. *Federal Trade Commission* v. *Brown Shoe Co.*, 384 U.S. 316; *Federal Trade Commission* v. *Motion Picture Adv. Co.*, 344 U.S. 392.

Here the record shows that substantial interstate sales were made pursuant to the price fixing conspiracy. In 1960 petitioner Langendorf's sales to Alaskan customers totalled $35,789.50; petitioner Continental's sales to Alaskan customers were approximately $22,500; petitioner Safeway admitted that some of its bread produced in Seattle was shipped to adjoining states; and several other participants in the conspiracy admitted they shipped out-of-state bread into Washington (Con. Pet. App. 30a–31a). It is well established that if an unlawful price-fixing conspiracy operates in interstate commerce, the total amount of such commerce involved (assuming that it is more than *de minimus*) is immaterial. *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305, 310; cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 225, n. 59; *Sun Oil Co.* v. *Federal Trade Commission*, 350 F. 2d 624, 631–632 (C.A. 7), certiorari denied, 382 U.S. 982; *United States* v. *Penn-*

[3] Although the question is not directly presented here, we submit that *Bunte Bros.* does not foreclose the Commission's alternative basis for jurisdiction. *Bunte* involved a local sales practice—the use of break-and-take candy packages—not conduct violating the antitrust laws carried out as part of national operations by integrated, multi-sales firms. Cf. *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115.

sylvania Refuse Removal Association, 357 F. 2d 806 (C.A. 3), certiorari denied, 384 U.S. 961. While the volume of interstate sales here—more than $50,000 in 1960—may be small in proportion to the total sales involved in the conspiracy, it plainly was not *de minimus.*

Petitioners err in contending (Con. Pet. 6) that the Commission "disclaimed" reliance on these interstate sales as a jurisdictional basis. As noted, the Commission asserted alternative bases for its jurisdiction, and its lengthy discussion of the integrated interstate character of Continental's operations in no way constituted an abandonment of its other jurisdictional theory. Both the hearing examiner (Con. Pet. App. D 124a) and the Commission (Con. Pet. App. B 30a–31a) expressly held that the Alaska and other interstate sales of bread were in interstate commerce, and the Commission held that these sales were at a price inflated by the conspiracy (Con. Pet. 30a–31a, n. 1).

Since the court of appeals properly sustained the Commission's jurisdiction on the basis of these interstate sales, there is no occasion to consider either the Commision's alternative jurisdictional theory that, because of the integrated interstate operations of the bakeries, all their sales in Washington were in interstate commerce; or the claim that, in applying the alternative theory to this case, the agency improperly took official notice of certain findings it had made in another administrative proceeding against Continental.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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